

Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| FIRESIDE MEDIA and JET FUEL |) | |
| BROADCASTING |) | FOIA Control No. 2011-131 |
| |) | |
| On request for Inspection of Records and |) | |
| Review of Estimated FOIA Processing Costs |) | |
| |) | |
| FIRESIDE MEDIA |) | File No. BNP-20040130APE |
| |) | Facility ID No. 1661371 |
| |) | |
| For a New AM Broadcasting Station at Larga |) | |
| Vista, Texas |) | |
| |) | |
| and |) | |
| |) | |
| For a New AM Broadcast Station at Pass |) | File No. BNP-20040130APU |
| Christian, Mississippi |) | Facility ID No. 161128 |
| |) | |
| and |) | |
| |) | |
| JET FUEL BROADCASTING |) | File No. BNP-20040130AQL |
| |) | Facility No. 161328 |
| |) | |
| For a New AM Broadcast Station at Winooski, |) | |
| Vermont |) | |

MEMORANDUM OPINION AND ORDER

Adopted: August 21, 2012

Released: August 22, 2012

By the Commission:

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we dismiss a petition¹ filed by Fireside Media and Jet Fuel Broadcasting (collectively “Fireside”),² which requests reconsideration of an October 25, 2011 decision by the Commission upholding the fees associated with Fireside’s request under the Freedom of

¹ “Request for Reconsideration of FCC 11-158, Which Continues to Obstruct Vital Public Documents Detailing Reported Misconduct in the FCC’s FM Spectrum Auction Process; and Request for Acceptance of Appeal of DA-11-1164, With Reinstatement of Reconsideration Before the Commission of FCC 10-108” (Nov. 25, 2011) (“Petition”).

Information Act (FOIA) (“FOIA Fee Order”).³ We also dismiss the request in the Petition to “reinstate before the Commission” a petition for reconsideration that was dismissed by the Media Bureau on October 3, 2011 (“Bureau Reconsideration Order”).⁴

II. BACKGROUND

2. Fireside’s Petition addresses two distinct matters. The first arises from Fireside’s FOIA request seeking records regarding alleged misconduct in FM Auction 37.⁵ The Office of General Counsel (OGC) denied Fireside’s request for a waiver or reduction of fees for processing this FOIA request, because Fireside’s public interest arguments in favor of a fee waiver constituted mere speculation and because Fireside’s FOIA request was in its own commercial interest. Subsequently, the Wireless Telecommunications Bureau (WTB) sent Fireside a fee estimate of \$1380.⁶ In the FOIA Fee Order, the Commission denied the applications for review filed by Fireside and upheld both OGC’s denial of a waiver or reduction of fees and WTB’s fee estimate.⁷ Fireside seeks review of both decisions.

3. The second matter concerns a series of orders by the Media Bureau (MB) and the Commission denying Fireside’s requests for extensions of time to file Form 301 applications for several new AM broadcast facilities.⁸ In the Bureau Reconsideration Order, MB dismissed a petition for reconsideration filed by Fireside on the grounds that the petition was “devoted to re-argument, recharacterization, or extension” of the same arguments that the Commission had already considered and rejected in prior orders on this subject, or to the extent that the contentions were new, they failed to identify “any material error, omission, or reason warranting reconsideration” of prior orders.⁹

III. DISCUSSION

² Fireside Media and Jet Fuel Broadcasting are sole proprietorships of Dave Garey. For ease of reference they are both referred to in this order as “Fireside.”

³ *Fireside Media and Jet Fuel Broadcasting*, Memorandum Opinion and Order, 26 FCC Rcd 15705 (2011) (“*FOIA Fee Order*”).

⁴ *Fireside Media and Jet Fuel Broadcasting*, Order on Reconsideration, 26 FCC Rcd 14153 (MB 2011) (“*Bureau Reconsideration Order*”).

⁵ E-mail from Fireside Media and Jet Fuel Broadcasting to FOIA@fcc.gov (Jan. 7, 2011). This is not the first time Fireside raised its concerns about FM Auction 37. As the Commission stated in the *FOIA Fee Order*, Fireside participated in FM Auction 37, the first Commission auction of FM radio frequencies, but withdrew while the auction was still in progress and was assessed penalties. Fireside subsequently notified the Commission that due to financial hardship it was unable to pay those penalties, and the Commission compromised the penalties in 2008. 26 FCC Rcd at 1507 n.18 (citing *Fireside Media Order*, 23 FCC Rcd 13138, 13139 (2008) (*Fireside Media Order*)). Fireside then filed a Petition for Partial Reconsideration of the *Fireside Media Order*, which the Commission dismissed as untimely filed while also rejecting all of Fireside’s arguments, particularly with respect to the alleged unfairness of the bid withdrawal penalties and their effect on Fireside. *Memorandum Opinion and Order*, 25 FCC Rcd 2453, 2454-57 (*Fireside Reconsideration Order*). Nonetheless, Fireside or its proprietor, Garey, continued to press its claims concerning FM Auction 37 in the context of AM Auction 84 and related application and construction permit proceedings. The Commission likewise rejected those claims. *Jet Fuel Broad.*, Memorandum Opinion and Order, 25 FCC Rcd 12935, 12939 (2010); *Fireside Media and Jet Fuel Broad.*, Memorandum Opinion and Order, 25 FCC Rcd 7754, 7757 (2010); see also *Fireside Media Order*, 23 FCC Rcd at 13139 ¶ 3 n.6.

⁶ FOIA Fee Order, 26 FCC Rcd at 15705 ¶ 2.

⁷ *Id.*, 26 FCC Rcd 15707 ¶ 1.

⁸ The lengthy history of this and related matters may be found at *Fireside Media and Jet Fuel Broadcasting*, 25 FCC Rcd at 7755-57.

⁹ Bureau Reconsideration Order, 26 FCC Rcd at 14155-56 ¶ 6.

4. Fireside's Petition fails to comply with the Commission's procedural rules with respect to both matters for which it seeks review. To the extent that Fireside's Petition seeks reconsideration of the FOIA Fee Order, it fails to comply with sections 1.106(b)(2)(i) and (ii) of the Commission's rules, which set forth the conditions under which the Commission will consider petitions for reconsideration of Commission denial of an application for review.¹⁰ Pursuant to these provisions, reconsideration will only be entertained if: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters, or (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.¹¹ Any petition that does not rely on new facts or changed circumstances may be dismissed as repetitious.¹²

5. Here, Fireside raises no new facts or changed circumstances since it filed its applications for review. Fireside merely repeats arguments already considered and rejected by the Commission that a fee waiver or reduction is warranted because it would serve the public interest for Fireside to place the documents responsive to its FOIA request on a website.¹³ Accordingly, we dismiss Fireside's Petition to the extent that it seeks review of the Commission's FOIA Fee Order.

6. Fireside's attempt to seek further review of the Bureau Reconsideration Order is also procedurally infirm and will be dismissed. Because the Petition seeks Commission review of an MB action under delegated authority, it is effectively an application for review governed by 47 C.F.R. § 1.115. Under Section 1.115(d), applications for review must be filed within 30 days from the date of public notice of the decision at issue.¹⁴ The Bureau Reconsideration Order was released on October 3, 2011, and Fireside's Petition was filed on November 25, 2011, 53 days later and beyond the 30-day deadline. We find no basis to waive this deadline, because we do not waive filing deadlines "in the absence of extremely unusual circumstances."¹⁵ We find that Fireside's reliance on Congressional staff's allegedly erroneous interpretation of the Commission's rules (based on misinformation that had allegedly been provided to Congressional staff) does not constitute good cause for a waiver.¹⁶ Accordingly, we also dismiss Fireside's Petition to the extent that it seeks review of the Bureau Reconsideration Order.

¹⁰ 47 C.F.R. §§ 1.106(b)(2)(i) and (ii). *See also* 47 C.F.R. § 1.115(g) (slight variations in wording).

¹¹ 47 C.F.R. § 1.106(b)(2)(i) and (ii).

¹² 47 C.F.R. § 1.106(b)(3). Although this rule delegates authority to the staff to dismiss repetitive petitions, we have chosen to act on all the requests contained in the petition in order to terminate Commission consideration of Fireside's repetitive pleadings.

¹³ FOIA Fee Order, 26 FCC Rcd at 15708-09 ¶¶ 6-8.

¹⁴ Even if Fireside's petition were treated as a petition for further reconsideration by MB, it would be subject to the same 30-day deadline. *See* 47 C.F.R. § 1.106(f).

¹⁵ *See NetworkIP v. FCC*, 548 F.3d 116, 126 (D.C.Cir. 2008) (finding that counsel's error was not an extenuating circumstance prohibiting a timely filing that would justify waiver of a filing deadline).

¹⁶ Fireside said that it was told by Congressional staff that it had no right to an appeal and by the time he checked with FCC staff, it was too late to file. The actions and statements of the Commission's own staff are not binding on the Commission unless and until we specifically endorse them, *Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 665 (D.C. Cir. 2004); allegedly incorrect advice given by Congressional staff similarly does not bind the Commission. Moreover, given the long list of administrative appeals Fireside has previously filed, Fireside should have been able to inform itself of the filing deadline in this case.

V. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED, that the Petition filed by Fireside Media and Jet Fuel Broadcasting IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary